UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

TRIUMPH AEROSTRUCTURES, VOUGHT AIRCRAFT DIVISION Respondent, and LAWRENCE HAMM, an Individual, Charging Party, and RODNEY HORN, an Individual, Charging Party, and THOMAS SMITH, an Individual, Charging Party, and THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 848, Charging Party.	Case Nos. 16-CA-197912 16-CA-198055 16-CA-198410 16-CA-198417

POST-HEARING BRIEF OF RESPONDENT TRIUMPH AEROSTRUCTURES

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I. SUMMARY OF THE CASE AND ARGUMENTS

This Section 8(a)(5) litigation over a 12-employee layoff, one termination, and one suspension turns on two fundamental legal principles under the National Labor Relations Act ("NLRA" or "Act"). First, a labor union, as the exclusive bargaining agent, controls *whether and how* its bargaining rights are pursued. Bargaining is a two-way street: while employers are obligated to bargain over certain topics *at the union's request*, employers do not control the union's choice to bargain or not to bargain. Second, employers *have the right to make decisions necessary to run their business* in the face of economic or other exigencies (such as reduced customer demand), as long as they provide adequate notice and opportunity to bargain prior to implementing such decisions. Labor unions cannot "veto" such decisions simply by withholding agreement or failing to engage on those issues, and individual employees dissatisfied with their union's bargaining choices cannot challenge the union's actions or inactions via a Section 8(a)(5) charge against their employer. Nor can the union, individual employees, or the Board use Section 8(a)(5) to obtain what the union failed to obtain through the collective-bargaining process.

In light of these two principles, the General Counsel's allegations here are without merit. Specifically, the Second Amended Consolidated Complaint ("Complaint") alleges that Respondent Triumph Aerostructures ("Triumph" or "Company") violated Section 8(a)(5) of the NLRA when it (i) laid off 12 employees (including Charging Parties Lawrence Hamm, Michael Kindley, and Rodney Horn) represented by the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 848 ("Local 848" or "Union") after giving the Union 24 days' advance notice and engaging in extensive bargaining; and (ii) failed to give *pre-discipline* notice of its decisions to terminate Thomas Smith and suspend Rodney Horn, even though the Union had for almost three years received *post-discipline* notice for hundreds of other discipline matters without objection or request to bargain.

These Section 8(a)(5) bargaining allegations – which arose while the parties were negotiating an initial collective bargaining agreement – began in May 2017 with charges filed by four individuals (Lawrence Hamm, Michael Kindley, Rodney Horn, and Thomas Smith). These four individuals were not Union agents or representatives, had no firsthand knowledge of the negotiations and past dealings between Triumph and the Union, and Triumph owed them no bargaining duties. The Union itself did not file any charges, and did not join this case until a few weeks before the original complaint issued in January 2018.

With respect to the layoff allegation, Counsel for the General Counsel ("GC") claims Triumph implemented the layoff "without first bargaining with the Union to impasse over the layoff." This allegation is not supported by Board law or the record evidence. No party disputes that the April 21 layoff was due to economic, exigent circumstances –Triumph decided to reduce headcount in the bond shop at its Red Oak, Texas facility after unforeseen customer decisions to reduce orders. The record evidence – much of which is undisputed – shows extensive bargaining occurred here.

Triumph gave the Union *over three weeks' notice* of its tentative plan to lay off 12 employees from the bond shop at Triumph's Red Oak, Texas facility on April 21, 2017. The

stipulated evidence shows Triumph and the Union bargained over the layoff issue on four days in April and exchanged numerous written proposals. The Union never requested to bargain over Triumph's operational determination to reduce the bond shop headcount or the size of the reduction. Nor did the Union propose any alternatives to reducing bond shop headcount to align staffing with customer needs, such as proposing part-time hours, job sharing, etc. While the Union pursued bargaining over the effects of the layoff decision on impacted bond shop employees – including whether the affected employees would be permanently separated or instead be loaned or reassigned to other departments and alternative procedures to select employees for removal from the bond shop – the parties were unable to reach an agreement.

The GC's claim that Triumph failed to satisfy its bargaining obligations prior to implementing the layoff should thus be rejected for several reasons. First, the notice and bargaining Triumph provided to the Union was more than sufficient to satisfy Triumph's bargaining obligations under the "economic exigency" doctrine. The Board has never found a bargaining violation where, as here, the employer gave the union 24 days' advance notice of a proposed layoff and the parties met multiple times to bargain and exchange written proposals. The Board does not require layoff bargaining in exigent circumstances to be protracted, and unions are required to pursue their bargaining rights in a timely and speedy manner. As noted above, bargaining is a two-way street, and the Union here did not request further bargaining or make additional proposals after April 19. Under these circumstances, Triumph lawfully implemented the layoff on April 21.

Second, the Union waived bargaining over the layoff *decision* – which in this case was the threshold operational decision to "lay off" – i.e., remove – 12 employees from the bond shop based on lower customer demand. The Union pursued bargaining over *effects* issues only, including loan/reassignment rights and selection procedures. To the extent the GC intends to argue that these issues were also part of the "decision" over which Triumph was required to bargain with the Union to agreement or impasse prior to implementing the layoff, the GC's apparent position would dramatically expand the scope of an employer's pre-implementation bargaining obligation and is inconsistent with the Board's expedited framework for layoff bargaining in exigent circumstances.

Third, even assuming the Union did not waive decision bargaining, the parties reached impasse on the "layoff decision," however defined, before April 21, 2017. Triumph – from the start – proposed conducting the layoff pursuant to the status quo reduction in force policy, and the parties bargained over several alternatives to the status quo policy but failed to reach an agreement. The evidence shows the parties had exhausted bargaining over alternatives by April 19 and were at a "deadlock" on whether or how to deviate from the status quo policy. After that date, the Union pursued no further bargaining nor made further proposals. Having fulfilled its bargaining obligations, Triumph acted lawfully in thereafter implementing the layoff under its proposed method for addressing the staffing problem – the status quo procedures in effect for over three years and utilized for a 2015 layoff from the bond shop.

The one termination allegation and one suspension allegation also lack merit. The GC asserts that Triumph violated Section 8(a)(5) because it did not notify the Union prior to (i)

terminating Mr. Smith on November 17, 2016; and (ii) suspending Mr. Horn on April 3, 2017. As an initial matter, the sole legal basis for these allegations – the Board's decision in *Total Security Management*, 364 NLRB No. 106 (Aug. 26, 2016) – is flawed and should be overturned. But the allegations can and should be dismissed regardless of whether *Total Security Management* remains extant law. The GC's position entirely ignores the parties' longstanding practice regarding Triumph's regular discipline notifications and requests to engage on discipline matters at the Red Oak facility. That practices estops the Union from asserting the notice it was given was inadequate and forecloses the alleged violations.

Specifically, from March 2014 until May 2017, the Union acquiesced in Triumph's practice of providing routine notification of all disciplines issued to bargaining unit employees at the Red Oak facility through update letters to the Union. While Triumph repeatedly offered – in each letter totaling around three dozen – to give the Union pre-discipline notice and opportunity to bargain, the Union did not respond, and the evidence – including Local 848's president's own admission at the hearing – shows the Union had *no interest* in receiving notification of or bargaining over discipline before it was issued.

During this three-year period, Triumph issued disciplines to dozens, if not hundreds, of bargaining unit employees. Yet the Union never objected to Triumph's practice of providing after-the-fact updates or requested before-the-fact notice or bargaining. On May 26, 2017 – *after* Mr. Smith and Mr. Horn filed unfair labor practice charges that initiated this case – the Union for the first time sought pre-discipline notice. Triumph quickly agreed, and within six days, the parties negotiated and agreed on an interim discipline notification procedure.

Prior to that date, however, Triumph cannot be held liable for lack of pre-discipline notice based on the equitable estoppel/waiver doctrine. As noted above, unions control whether and how to pursue their bargaining rights. Here, the Union ignored Triumph's discipline notifications and requests to engage for over three years. The Union chose not to pursue its rights in this area and, having acquiesced in Triumph's longstanding practice of providing post-discipline notice, it is equitably estopped from asserting otherwise now.

In sum, the present case turns heavily on the Union's actions *and inactions* in representing bargaining unit employees during a lengthy first contract negotiation period. While some individual employees may have been dissatisfied with the results of the Union's choices, the Board does not regulate the substance of bargaining. This litigation should not be used to retroactively secure bargaining outcomes the Union failed to request or obtain. Accordingly, the complaint allegations should be dismissed in their entirety.

II. BACKGROUND ON TRIUMPH'S RED OAK FACILITY

Triumph produces aerospace parts and components for military and commercial customers at facilities located throughout the United States, including a facility in Red Oak, Texas, and a facility in Grand Prairie, Texas (known as the Marshall Street facility).

Triumph's Red Oak facility opened in late 2013. For many years prior to 2013 – since the 1940s – Triumph and its predecessors also operated a large manufacturing site in Dallas,

Texas, known as the Jefferson Street facility. From 1968 until 2013, production and maintenance employees at the Jefferson Street and Marshall Street facilities were represented by the Union in a combined multi-facility bargaining unit. Joint Stip. 1.

In 2012, the real estate for the Jefferson Street operations was sold to a new owner, and Triumph and the new owner failed to agree on new lease terms. Joint Exh. A.2, at 7-8. As a result, Triumph decided to build a new facility in Red Oak, Texas and relocate operations there. Joint Stip. 2. In February 2013, Triumph informed the Union of its decision to close the Jefferson Street facility and relocate to Red Oak. Joint Exh. A.2, at 8. In August 2013, before the Union's recognition attached at the site months later, Triumph established and implemented initial terms and conditions of employment for employees at its Red Oak facility, including but not limited to a code of conduct, a progressive discipline policy, and a reduction in force policy. Joint Stip. 3; Joint Exh. A.

The Red Oak facility opened in October 2013. From October 2013 to March 2014, Triumph steadily transferred work, equipment, and bargaining unit employees from Jefferson Street to the Red Oak facility. Joint Stip. 4; Joint Exh. A.2, at 8-9. Based on employee transfer levels, Triumph recognized the Union as the exclusive bargaining representative of the production and maintenance employees at Red Oak on January 13, 2014 and offered to bargain with the Union for a new collective-bargaining agreement. Joint Stip. 5; Joint Exh. A.1, at 9. In response, the Union filed Board charges asserting that the Red Oak employees were already covered by the collective-bargaining agreement ("CBA") for the Jefferson Street-Marshall Street multi-facility unit. In December 2014, the Regional Director for Region 16 issued a unit clarification decision holding that the Red Oak facility constituted a separate appropriate bargaining unit. Joint Exh. A.2. Correspondingly, the Union's demand to impose the old contract at Red Oak was rejected. The Union also lost a contract arbitration over the same unit scope and contract application issues. Tr. 239:1-9.

In May 2015, after the NLRB and arbitral litigation had run its course, the Company and the Union began negotiating their first CBA to cover bargaining unit employees at the Red Oak facility. Joint Stip. 9. Bargaining continued until contract ratification on March 25, 2018. Joint Stip. 37; Joint Exh. Y.

III. THE LAYOFF ALLEGATIONS

A. FACTS RELATING TO THE LAYOFF ALLEGATIONS

1. Triumph Becomes Aware of Customer Demand Reductions That Require a Headcount Reduction in the Red Oak Facility's Bond Shop.

The bond shop at Triumph's Red Oak facility is distinct from the rest of the plant. Tr. 242:25-243:7. It has a separate supervisory structure, cost data, and performance trends. Tr. 244:2-6, 244:23-245:2. Bond shop employees (bonders) have their own job classification, perform different work, and utilize different skills than employees in other classifications, such as assembly, painting, toolmaking, production, and maintenance. Tr. 243:11-19, 244:7-22, 406:3-407:3.

In early 2017, Triumph customers utilizing the bond shop included Pratt & Whitney, Northrop Grumman, Bell Helicopter, and Gulfstream Aerospace. Tr. 375:25-376:6. Triumph's bond shop business is highly dependent on and sensitive to its customers' orders and production schedule requirements. Tr. 241:18-242:10, 378:8-13. Managers review staffing levels on a regular basis and forecast manpower requirements from three months to a year out, based on anticipated work volume. Tr. 375:12-15, 380:11-381:15, 388:12-23. In the bond shop, these staffing analyses are conducted in the aggregate and for each customer program. Tr. 388:4-23; R. Exh. 15 (aggregate analysis); GC Exh. 10 (program-specific analysis).

In early 2017, anticipated volume in the bond shop unexpectedly declined due to unforeseen decisions by Bell and Gulfstream to reduce orders and production schedules. Joint Stip. 19; Tr. 376:8-24, 377:19-378:7. As a result, the bond shop manpower forecast began showing that by the end of April 2017 the volume of work in the bond shop would not sustain current staffing levels. R. Exh. 15; Tr. 384:20-385:1. At the time, there were approximately 97 bonders in the bargaining unit (out of approximately 500 unit employees), and the manpower forecast showed that after Friday, April 21 there would only be enough work for 80 employees. R. Exhs. 15 and 16; Tr. 385:2-8. After that, the forecasted volume of work declined even further. R. Exh. 15 and 16; Tr. 385:9-10.

Thus, Bond Shop Manager Eileen Rowe informed Triumph's Senior Director of Labor Relations, Danielle Garrett, that the bond shop would be overstaffed starting in late April, and Triumph decided to reduce headcount in the bond shop to avoid overstaffing. Tr. 246:24-247:7, 247:17-24, 385:16-25. Initially, Triumph was not certain how many bonders would be affected or the precise date the reduction would occur, as it was still waiting on final information from customers. Tr. 248:24-249:5, 385:25-386:2. Based on the preliminary customer data available in late March, Triumph believed the size of the reduction would range from 6 to 15 employees. Tr. 249:6-9, 386:2-7.

2. Triumph Gives the Union Notice and an Opportunity to Bargain.

On March 28, 2017, Triumph sent a letter to the Union providing notice of its tentative plan to "lay off" 12 bargaining unit employees from the bond shop on Friday, April 21, 2017. Joint Stip. 18; Joint Exh. G. The letter explained that the headcount plan was "due to a reduction in the bond shop loads, primarily due to the production slowdown in G600 and P-42 Programs," that the size of the reduction could range from 6 to 15 employees, and that Triumph intended to make a final decision by April 10. *Id.* Triumph stated that it "intend[ed] to comply with the status quo layoff policy," but was "willing to discuss or meet over these tentative layoffs if the Union is interested" and was "willing to discuss a potential loan agreement to keep the affected employees gainfully employed." *Id.*

Triumph's "status quo layoff policy" was a reduction in force policy it had lawfully implemented in August 2013, as part of the Red Oak facility's initial terms and conditions of employment. As to the layoff decision, the policy provided:

> Management will begin by assessing the remaining and future statement of work and determine the skills and abilities needed to perform the remaining and future

statement of work. Management will then determine the RIF units [the peer group against which employees in the same classification are compared] and classifications where reductions will occur.

Joint Exh. A, at 2. As to the layoff selection procedure, the policy provided that employees within the impacted classification would be rated and ranked based on performance factors and selected for layoff in order of ranking (which the parties referred to as "rack and stack"). *Id.* Specifically, employees were rated in eight competencies: attendance, communications, integrity/organizational commitment, job knowledge/skills/learning, productivity, quality, safety, and teamwork. *Id.* at 4. The status quo layoff policy, however, did not include policies on internal loans for affected employees, transfer rights to other classifications or departments, or recall rights. Tr. 193:18-194:10, 278:9-11.

On March 30, the Union "accept[ed] the opportunity to negotiate the anticipated layoffs" and requested bargaining dates. Joint Stip. 20; Joint Exh. H. That same day, the Union also sent a request for information. Joint Stip. 21; Joint Exh. I. Triumph responded on March 31, 2017, provided requested information,[1] and proposed to bargain over the tentative headcount reduction and related issues during nine previously-agreed on dates for first contract negotiations. Joint Stip. 22; Joint Exh. J.

3. Triumph and the Union Engage in Extensive Bargaining.

Bargaining over the bond shop layoffs – most specifically the impact on bargaining unit employees and potential alternatives to the status quo policy – occurred on April 5, 6, 7, and 19, 2017. The parties first met to discuss the layoff on April 5. The Union did not pursue, however, bargaining over Triumph's *threshold decision to reduce bond shop headcount or the size of the headcount reduction.* Tr. 263:10-23. Instead, the parties turned to the issues of *how* to reduce headcount in the bond shop, *who* to select for the reduction, and *what rights* may apply to the impacted employees.

The Union was interested in the idea of an arrangement to loan bonders out to other job classifications or assignments in the plant, which would allow them to remain employed by Triumph, albeit not in the bond shop, but asked Triumph to provide a framework for discussion, which Triumph offered on April 5. Tr. 263:1-264:8; Joint Exh. K. As noted above, there was no status quo "loan" policy or program in effect. The parties exchanged proposals on April 5 and 6 over a possible loan arrangement whereby affected employees would perform various lean/operational improvement projects, which are summarized in the following chart:

[1] While the Union's request for all employee attendance cards was much more burdensome and time-consuming to compile, Triumph eventually provided them to the Union. Tr. 256:22-257:2, 119:14-16.

Topic	Company's 4/5/17 Framework (Joint Exh. K)	Union's 4/6/17 Proposal (Joint Exh. L)	Company's 4/6/17 Counterproposal (Joint Exh. M)
Compensation	Not affected	Not affected	Not affected
Selection for Loan	Company to have sole discretion	Volunteers only	Company to have sole discretion
Assignment	Company to have sole discretion	Loaned employees to be placed into positions where they have previous experience or may be successful	Company to have sole discretion, but will attempt to mutually resolve concerns with the Union

The parties discussed the potential loan arrangement in detail at the April 5 and 6 meetings. Triumph explained that it needed flexibility to select employees for loan based on program-specific work requirements in the bond shop. Tr. 266:2-23, 268:3-20. Triumph explained that a "volunteer only" approach was not acceptable, and that the Union's proposal also failed to account for a scenario where too few volunteers "signed up" for the loans. Tr. 266:24-267:16, 268:15-20.

After the parties discussed Triumph's counterproposal on April 6 (Joint Exh. M), the parties had an off-the-record conversation. Triumph told the Union that if the Union was going to insist on a volunteer selection process, *then the parties were unlikely to reach an agreement and should instead focus on topics they could agree on*. Tr. 269:16-270:4. The Union apparently viewed Triumph as "withdrawing" its loan proposal, but Triumph did not have the same view. Tr. 269:22-270:4. The Union did not dispute that it was insisting on volunteers for any alternative loan program, nor did it indicate a willingness to give Triumph discretion over selection of employees for the loans. Tr. 272:12-16.

On April 7, the Union sent Triumph another information request in anticipation of discussing something other than loans, in this case transfer rights to other departments for impacted bonders. Joint Exh. N. Triumph asked the Union to clarify its request during the April 7 session and confirmed the Union already had access to the employee information it wanted. Tr. 270:17-271:15; R. Exh. 6, at 2-9. At the April 7 session, the parties exchanged new proposals regarding the right of impacted bonders to be transferred into open positions in the Red Oak assembly department (i.e. transfer rights), the layoff selection process, and recall rights, summarized below:

Topic	Union's 4/7/17 Proposal (Joint Exh. O)	Company's 4/7/17 Proposal (Joint Exh. P)
Selection Process	Reverse seniority only; no consideration of employee performance	Modified "rack and stack" performance ranking with seniority as one factor
Assembly transfer rights	Automatic offer Four-week skills training Maintain compensation Maintain seniority	Employees affected by layoff may apply for an open assembly position Compensation based on experience Maintain seniority
Recall rights	No proposal	No recall rights to bond shop

Triumph and the Union discussed their proposals on April 7. The parties had previously discussed layoff selection during their overall contract bargaining sessions, and each was familiar with the other's position. Tr. 176:15-177:10, 198:4-12, 279:18-24. While a selection procedure based solely on seniority was unacceptable to Triumph, as it needed some control over selection to ensure that it retained the employees who were best suited to perform the remaining work, Triumph attempted to compromise by offering a modified ranking procedure that took seniority into account. Tr. 128:16-22, 185:13-16, 272:23-273:6, 278:20-279:7, 280:19-25; Joint Exh. P.

As to the issue of pay for laid-off bonders who transferred to the assembly department, Triumph explained that it would be unfair to automatically guarantee they would be paid the same compensation they had received in the bond shop because assembly work required different skills. Tr. 274:7-15, 281:22-282:1. Triumph's position was that compensation should reflect the employees' skills and experience in assembly. Tr. 274:16-275:3. At the time, the Union did not tell Triumph it was categorically opposed to the concepts outlined in Triumph's April 7 proposal (Joint Exh. P) and indicated it would consider them. Tr. 281:3-282:3. But the parties left the session without any agreement.

April 7 was a Friday. During the week of April 10, David Barker (the Union's chief negotiator) and Danielle Garrett (Triumph's chief negotiator) were scheduled to be in Tulsa, Oklahoma for bargaining over a first contract at Triumph's Tulsa facility. Tr. 200:25-201:8, 282:13-17. The Union did not attempt to cancel or re-schedule the Tulsa negotiations to pursue additional bargaining over the planned Red Oak facility layoffs, nor did the Union seek to meet with other Triumph representatives to discuss the layoff that week. Tr. 283:17-284:3.

4. The Parties Reach a Conclusion in Bargaining As They Approach the April 21 Target Date for Bond Shop Headcount Reductions.

On Friday, April 14, the Union sent Triumph a letter. Joint Exh. Q. In the letter the Union made clear that it was not interested in considering any compromise proposals on the issues of selection procedure and compensation for bonders who transferred to assembly. Only seniority-based selection and compensation grandfathering would appear to satisfy the Union. The Union also confirmed it did not believe the parties would reach an agreement before April 21. Specifically, the letter:

- Rejected Triumph's April 7 counter-proposal (Joint Ex. P);
- Withdrew the Union's April 7 modified rack and stack proposal, and stated that "the Union is wholeheartedly opposed to the rack and stack [performance ranking] philosophy";
- Identified some items the Union "would like to see," including (i) "some form of a plant-wide retirement incentive to reduce headcount in the bond shop"; (ii) a mechanism by which laid off employees could apply for an open assembly position at the Red Oak facility and be given an offer of employment at their current rate of pay, benefits, and seniority; and (iii) laid off bond shop employees would have recall rights for 15 months.
- Acknowledged that the parties might not reach an agreement: "it appears that the two parties might not reach an agreement concerning a layoff procedure in a timely manner for the bond shop layoffs that are upon us."

Joint Exh. Q.

On April 18, the Union for the first time requested "all evaluations of Bond Shop and NDI employees, the competencies used, who evaluated each employee, and anyone else that had input on the ratings." Joint Exh. R. This request related to the application of the status quo reduction in force policy that required Triumph to select employees based on their performance rating.

On April 19, the parties met again to bargain over the bond shop layoff and related issues. Triumph rejected the Union's April 14 letter "proposals," as they did not align with legitimate business needs. Joint Exh. T. The Union asked Triumph early in the session to delay the scheduled April 21 layoff by several days so the parties could continue bargaining, but Triumph declined, as the parties had already engaged in extensive bargaining and Triumph did not see the parties being able to reach any alternative deal after the Union's clear rejection of Triumph's April 7 good faith compromise to deviate from status quo layoff procedures. R. Exh. 7 (9:17 a.m. session), at 7-8. The Union then made another proposal on April 19, summarized below:

Topic	Union's April 19 Proposal (Joint Exh. S)
Selection Process	-Only employees employed in the bond shop for less than 48 months would be eligible for layoff -Active discipline could not be considered in ranking employees using rack and stack
Assembly transfer rights	-Maintain current compensation -Maintain seniority
Recall rights	15 months

The parties went through the Union's latest proposal item by item during the April 19 session, and Triumph rejected the proposal as either identical to past rejected proposals, including on transfer rights with automatic compensation grandfathering, or not aligning with business needs. Tr. 294:10-297:9; R. Exh. 7 (1:00 p.m. session), at 1-11. On the issue of allowing for rankings of those with "less than 48 months" seniority, Triumph viewed that as akin to seniority-based layoffs because only those employees with limited seniority would be ranked and eligible for layoff. Tr. 294:20-295:16.

The Union stated at the session that "we understand what you [Triumph] rejected we will go discuss and talk about the direction we would like to go, if … a modified counter proposal at this point is appropriate we will make a determination and let you know." R. Exh. 7 (1:00 p.m. session), at 9. However, after a brief discussion, the Union came back to the table and informed Triumph:

> The union understands the company has rejected our proposal and we don't see resolution coming today. Our next order of business going forward will be dealing with the wage proposals and the disciplines in the morning and whatever contractual items we discuss over the next 2 days. We understand your rejection of our proposal.

Id. (2:26 p.m. session), at 1. After April 19, the Union did not make another proposal or request additional bargaining over the layoff before or after its implementation. Tr. 142:23-143:5, 144:24-145:18, 171:10-16, 206:4-6, 297:23-298:7. On April 20, Triumph provided the bonder rankings to the Union, which identified the bottom 12 individuals slated for layoff, in response to the Union's April 18 request. Joint Exh. U.

As indicated in Triumph's March 28, 2017 letter to the Union – which referred to the tentative plan to lay off 12 bond shop employees on April 21, 2017 but noted the size of the reduction could range from 6 to 15 employees – Triumph reviewed and considered a number of potential scenarios based on the customer information it was receiving, including different headcount reduction totals. Tr. 370:18-25, 371:13-22, 398:23-399:11; CP Exh. 1; GC Exh. 10.

Ultimately, Triumph decided that a layoff of 12 employees on April 21 aligned with its business needs. Tr. 371:1-3, 399:10-24, 401:23-402:2.[2]

On April 21, Triumph implemented the layoff. The 12 lowest-ranked employees in the bond shop (out of approximately 100) were laid off pursuant to Triumph's proposed method – the status quo layoff policy – because the parties had reached no agreement on an alternative selection procedure. The bottom 12 employees included three of the Charging Parties – Lawrence Hamm, Rodney Horn, and Michael Kindley.

Again, the Union never requested further bargaining over the layoff. Tr. 298:17-20, 305:4-14. While the parties had first contract bargaining sessions scheduled for April 26, 27, and 28, they did not bargain over the layoff or related issues at those meetings. Tr. 298:8-20. Nor did the Union file any unfair labor practice charges in connection with the layoff. Tr. 146:4-16, 207:22-25. Instead, the Union directed employees who complained about the layoff – employees who had not been part of the bargaining committee and did not have any firsthand knowledge of the negotiations – to file individual charges (and 3 of the 12 impacted bonders filed charges in May 2017). The Union did not join any of the charges until about three weeks before the complaint issued in January 2018. Tr. 148:1-11, 208:18-20, 210:8-10; GC Exh. 1(i).[3]

5. The April 2017 Layoff Mirrored the May 2015 Layoff Found Lawful.

The status quo reduction in force policy had been implemented for a layoff long before the salient layoff in April 2017. In May 2015, Triumph laid off five bond shop employees under that policy. Triumph first gave the Union notice and an opportunity to bargain before that layoff, on April 16, 2015, and the parties met once to bargain over the layoff, on May 4, 2015. R. Exh. 8 (April 16, 2015 letter and May 5, 2015 email); Tr. 300:18-301:7. After they failed to reach an agreement to deviate from status quo procedures, Triumph implemented the layoff on May 8, 2015 using its status quo policy. R. Exh. 8; Tr. 301:8-11, 301:19-21.

Unlike the 2017 layoff, the Union filed an unfair labor practice charge alleging the 2015 layoff violated Section 8(a)(5) of the Act. R. Exh. 9. The Regional Director for Region 16 dismissed the bargaining allegations, finding:

> With regard to the allegation that the Employer laid off employees without bargaining with the Union, the investigation revealed that the Employer notified the Union about the need to layoff employees and that the parties bargained about

[2] Triumph also considered a scenario where a second layoff would occur in June 2017, but it later decided another layoff was not necessary, and no June layoff occurred. CP Exh. 1; GC Exh. 10; Tr. 371:20-372:3, 395:14-20, 401:23-402:2. The reduced staffing level in the bond shop was sufficient to meet production demands from April 21 and thereafter. Tr. 394:18-396:12, 409:18-21.

[3] While the bond shop's reduced staffing levels were sufficient to keep up with production demands for many months after April 21, they were subsequently reduced even further through natural attrition, and eventually bond shop demand increased somewhat. Based on increased bond shop demand, all 12 laid off bond shop employees were offered reinstatement (shortly after the original complaint issued in early 2018), with some accepting and some declining the offer. Tr. 276:25-277:9.

that layoff prior to implementation. The parties did not reach an agreement as to how the layoffs would be implemented or who would be laid off. The Employer thereafter implemented its proposed method. The Employer satisfied its duty to provide the Union an opportunity to bargain, and bargained, about the layoffs.

Id., at 2.

B. ARGUMENT

The GC alleges Triumph violated Section 8(a)(5) of the Act by laying off 12 bond shop employees on April 21, 2017 "without first bargaining with the Union to impasse over the layoff." GC Exh. 1(s) (Second Amended Consolidated Complaint), paras. 13, 16, 17. This allegation lacks both legal and factual support.

Section 8(a)(5) does not mandate that employers and unions reach agreements in bargaining; rather it requires employers to provide appropriate notice and opportunity to bargain in advance of "changes" impacting terms and conditions of employment. Where, as here, parties are engaged in negotiations for a first or successor collective bargaining agreement and "matters arise where the exigencies of a situation require prompt action," short of those exigencies that allow for unilateral action, an employer will satisfy its bargaining obligation by providing the union with adequate notice and an opportunity to bargain. *RBE Electronics of S.D.*, 320 NLRB 80, 82 (1995). *RBE Electronics* is an exception to the *Bottom Line Enterprises* doctrine, which requires employers to refrain from unilateral changes absent overall impasse on bargaining for the agreement as a whole. 302 NLRB 373 (1991), enfd mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).[4] Once the employer has provided the union with notice and an opportunity to bargain, the employer can then act unilaterally if either the union waives its right to bargain or the parties reach impasse on the change. *RBE Electronics*, above at 82.

The Board in *RBE Electronics* recognized that "management does need to run its business, and changes in operations toward that end often cannot await the ultimate full-fledged contract bargaining." *Id.* at 81 (quoting *Dixon Distributing Co.*, 211 NLRB 241, 244 (1974)). Thus, "[i]n such time sensitive circumstances, … bargaining, to be in good faith, need not be protracted." *Id.* at 82 (citation omitted). The Board has also recognized an employer has a "legitimate concern with the need for speed and flexibility in effectuating a layoff to remedy its economic plight." *Lapeer Foundry & Machine*, 289 NLRB 952, 954 (1988). "In light of the economic circumstances motivating a company's decision to lay off employees," the Board requires that negotiations concerning a layoff decision "occur in a timely and speedy fashion." *Id.*

[4] For the exception to apply, the employer must show (1) "a need that the particular action proposed be implemented promptly"; and (2) that "the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." *RBE Electronics*, above at 82 (footnotes omitted). No party contests that the exception applies here. Joint Stip. 19.

The evidence adduced at trial convincingly shows Triumph satisfied pre-implementation bargaining obligations. First, Triumph gave the Union 24 days' advance notice and opportunity to bargain over the layoff, and did bargain by meeting on four occasions and exchanging multiple written proposals. This was more than adequate under the Board's "economic exigency" doctrine. Second, the Union waived bargaining over the layoff decision by pursuing bargaining over the effects of the layoff only. Third, even assuming the Union did not waive decision bargaining, the parties reached impasse before April 21, 2017. Finally, even if a bargaining violation is found here, the appropriate remedy is the more limited *Transmarine* "effects bargaining" remedy, rather than full reinstatement and backpay.

1. Triumph Gave the Union Sufficient Notice and Opportunity to Bargain Over the Layoff Under the Circumstances.

The Board has addressed bargaining over "layoffs" in similar situations and recognized that, because bargaining need not be protracted, an employer complies with Section 8(a)(5) with several weeks' notice and bargaining. *See, e.g., Gannett Co.*, 333 NLRB 355, 357 (2001) (to be adequate under the Act, "[t]he prior notice must afford the union a reasonable opportunity to evaluate the proposals and present counter proposals before implementing [the] change"). The Board even has found employers to satisfy their pre-layoff bargaining obligations with *less notice and bargaining* than Triumph provided the Union here. *See, e.g.*, *KGTV*, 355 NLRB 1283, 1284 (2010) (notice issued 3 weeks in advance of layoff implementation date "was an adequate period for the parties to negotiate"); *Paramount Liquor Co.*, 270 NLRB 339, 343 (1984) (dismissing failure-to-bargain allegation where union was given 11 days' notice of layoff and no final decision was made until after a meeting between the employer and the union); *Burns Ford, Inc.*, 182 NLRB 753, 754 (1970) (reasonable notice and opportunity to discuss impending layoff given where employer "was in a period of declining sales and was attempting to reverse this trend through various means," union was notified 6 days in advance, and parties met twice prior to layoff).

In cases where the Board has found a layoff bargaining violation, by contrast, the employer either (a) failed to provide notice or (b) refused to bargain altogether. *See, e.g.*, *Pan American Grain Co.*, 343 NLRB 318, 318 (2004) (finding violation where employer's general statements in 2001 concerning future workforce reductions were not sufficient to provide the union with a reasonable opportunity to bargain over the employer's decision to implement layoffs in February 2002), enfd. 558 F.3d 22 (1st Cir. 2009); *Ebenezer Rail Care Services*, 333 NLRB 167, 172-73 (2001) (finding violation where employer informed union of March 5 layoff on the afternoon of March 4, and noting the employer could have informed the union on March 1, "which would have provided ample opportunity to complete negotiations before that time"); *Lapeer*, 289 NLRB at 955 (finding violation where employer laid off employees without notifying the union or bargaining over the decision).

Critically, the Board has *never* found an employer violated its obligation to bargain over a layoff where the employer provided the union with several weeks' advance notice, provided

extensive information, met on four days to bargain, and exchanged numerous proposals or counterproposals to deviate from the status quo policies and procedures.[5]

Here, it is undisputed that the April 21, 2017 layoffs were a result of exigent circumstances – customer order levels – requiring prompt action. Joint Stip. 19 (stating in part "[t]he General Counsel does not allege that Respondent's business rationale failed to qualify as exigent circumstances such that Respondent had a duty to bargain to overall impasse or agreement with the Union on a collective bargaining agreement prior to making unilateral changes"). It is also undisputed that Triumph gave the Union notice on March 28, a total of 24 days in advance of the planned layoff, and that the parties met and bargained on four days in April and exchanged numerous written proposals. Joint Stips. 18, 25-27, 30.

From the outset, the Union recognized Triumph's need to implement the bond shop reduction promptly. In its March 30 letter responding to Triumph's offer to bargain, the Union noted the "time constraints" under which the parties would be bargaining. Joint Exh. H. In its April 14 letter, the Union again acknowledged the "time sensitivity" of the issues and even recognized the "parties might not reach an agreement concerning a layoff procedure in a timely matter for the bond shop layoffs that are upon us." Joint Exh. Q.

Although the parties did not reach an agreement to deviate from Triumph's proposal to apply the status quo reduction in force policy, both sides made proposals and counter-proposals that generated sincere disagreement over possible alternatives, such as internal loans, transfer rights, compensation levels, and selection procedures for impacted bonders. The fact that the parties did not reach an agreement does not mean a violation of the Act occurred. Bargaining has to reach a timely conclusion at some point, and an employer has to run its business. Under the circumstances, Triumph satisfied its duty to provide the Union an opportunity to bargain, and sufficiently bargained, about the layoff before implementation.[6]

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[5] In fact, as noted above, the Regional Director for Region 16 dismissed the charge filed by Local 848 involving the May 2015 bond shop layoffs, finding Triumph satisfied its bargaining obligation – despite less notice and bargaining than in 2017 – because Triumph "notified the Union about the need to layoff employees, and … the parties bargained about that layoff prior to implementation." R. Exh. 9, at 2.

[6] To the extent the Union's counsel's line of questioning regarding a potential second layoff in June was intended to suggest Triumph violated a bargaining obligation by failing to inform the Union of this possible scenario, this argument should be rejected. Triumph did not inform the Union about a *possible* second layoff because it decided not to pursue one. Tr. 368:3-8, 371:23-372:3. As described above, Triumph considered a number of potential scenarios involving different headcount needs, but ultimately made a final decision to reduce 12 bond shop positions on April 21. This was consistent with Triumph's March 28 letter to the Union, which stated the plan to lay off 12 employees on April 21 was tentative and the size of the reduction could range from 6 to 15 employees. The Union never requested bargaining over the size of the reduction, and Triumph had no obligation to inform the Union of every potential scenario it discussed internally. *See Valley Mould & Iron Co.*, 226 NLRB 1211, 1213 (1976) (employers have no obligation to disclose to a union "every thought or possibility" discussed by management concerning potential future business plans or strategies that have not been finalized).

2. The Union Waived Bargaining over the Layoff Decision.

Once a union has received notice of the employer's decision to lay off employees, the union must act with "due diligence" to request bargaining, or risk a finding that it has waived its bargaining right. *Bell Atlantic Corp.*, 336 NLRB 1076, 1086 (2001). While a union normally has the right to bargain over both the layoff decision and its effects, the Board will find that the union has waived its right to bargain over the decision where the union requests bargaining over the effects and fails to pursue bargaining over the decision. *KGTV*, 355 NLRB at 1284-84; *see also Print Fulfillment Services, LLC*, 361 NLRB 1243, 1247-48 (2014) (even though union initially requested bargaining over both layoff decision and its effects, the union effectively waived its right to bargain over the decision where it subsequently sought to bargain over only the selection of employees to be laid off and other effects of the layoff).

At the hearing, the GC focused on narrow aspects of the parties' pre-implementation bargaining – such as specific proposals made and the timing thereof – but never attempted to define the scope of Triumph's pre-implementation bargaining obligation. Although the Complaint is silent as to whether it alleges a decision or effects bargaining violation, or both, it appears that the GC is alleging a decision bargaining violation only, because there is no allegation that Triumph's *post-implementation* conduct violated the Act, and the Board as a general rule does not require the parties to reach agreement or impasse on effects issues prior to implementation. *See, e.g., Komatsu Am. Corp*., 342 NLRB 649, 650 (2004) (finding that meaningful effects bargaining occurred both before and after employer implemented its decision); *see also Port Printing AD & Specialties*, 351 NLRB 1269, 1270 (2007) (finding employer was required to bargain over the effects of layoff decision even after the layoff was implemented), enfd. 589 F.3d 812 (5th Cir. 2009).

The GC did not address the question of whether any given proposal involved Triumph's "decision" or its "effects." The evidence shows, however, the Union did not seek to bargain over Triumph's threshold decision to "lay off" bonders from their department – in other words to reduce headcount in the bond shop based on customer orders. In other words, the Union did not pursue bargaining over *whether to* reduce bond shop headcount. The Union never requested to bargain about Triumph's operational need to reduce headcount or the size of the reduction, even though Triumph's March 28 letter noted the headcount reduction might range from 6 to 15. Joint Exh. G. Nor did the Union make any proposals, such as job-sharing or part-time conversions, that would allow the bond shop to remain at full headcount. Triumph's Senior Director of Labor Relations, Danielle Garrett, confirmed that the Union "took it for a fact that we needed to lay people off from the Bond Shop. We never had any discussions about, was the layoff appropriate, was the quantity of people appropriate, nothing." Tr. 263:14-17. As a result, the Union waived its right to bargain over the threshold "layoff" decision and the Complaint allegation can be dismissed on this basis.

The testimony of the GC's witnesses only reinforced that the Union did not bargain over the decision here. Local 848 President James Ducker acknowledged that "[t]he decision in this case was that the bond shop was overstaffed and the headcount had to go down by approximately 12." Tr. 113:14-18. Ducker admitted that that the Union "depended on the number that they

[Triumph] were supplying," Tr. 117:10-11, and did not make any proposals that would have avoided the need to reduce headcount in the bond shop, Tr. 114:16-20, 115:7-16. Similarly, International Union Representative David Barker testified that "[t]he company makes a decision, we don't make a decision, the union doesn't make a decision to layoff anybody, the company makes that decision." 190:23-25.[7]

Instead, the Union pursued bargaining over *how to* reduce bond shop headcount and the *rights for* impacted bonders, including whether they would remain employed or not. Those are "effects issues" under well-settled law. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981) ("concessions, information, and alternatives that might … prevent the termination of jobs" and "matters of job security" are part of effects bargaining); *Print Fulfillment*, above at 1248 fn. 25 (noting that issues such as the "procedures to be followed in the reduction of the workforce [and] the [Parties'] rights and obligations in connection with said reduction" involved *the effects* of the layoff decision).

The GC's apparent theory – that the "decision" to lay off employees from the bond shop was the same as the "decision" of whether or not bargaining unit employees would remain employed by Triumph after April 21 – is not supported by Board law and would drastically expand the scope of the decision bargaining obligation in the layoff context. "A decision to lay off is predicated on the assumption that savings will accrue from reduced labor costs during a period when a full complement of workers is unnecessary." *Lapeer*, 289 NLRB at 953. Here, a full complement of bond shop employees was not necessary. This was the operative decision, as outlined in Triumph's status quo reduction in force policy. Joint Exh. A. The Union chose not to engage on that decision but instead turned to the impacts on affected employees (and who would be affected pursuant to selection procedures). It had the right to forego decision bargaining, and Triumph had the right to proceed with making and implementing the decision to reduce bond shop headcount on April 21 – regardless of whether the parties were at impasse over the "effects" of the threshold decision.

The GC's position also generates a fundamental conflict with the legal framework for layoff bargaining in *exigent circumstances*. As the Board has stated, bargaining in this context must be "timely and speedy," *Lapeer*, above at 954, and "need not be protracted," *RBE Electronics*, above at 82. The GC's apparent position on defining the "decision" would require an employer to first bargain to impasse or agreement over whether employees would lose their employment based on a department reduction *before* bargaining over the layoff "effects." This

[7] The Union's apparent belief that it had no ability to impact Triumph's decision, however, does not establish that the decision was a fait accompli, or that Triumph would not have bargained about the issue. *See KGTV*, 355 at 1284 ("A fait-accompli finding requires objective evidence; a union's subjective impression of its bargaining partner's intention is insufficient."). That is particularly true here, given Triumph's March 28 letter, which noted that its layoff plan was "tentative[]" and that the reduction could range from 6 to 15 employees. Joint Exh. G; *see also* Tr. 263:18-23 (Q: "And the Union could have come in and said, 'We don't want to take people out of the Bond Shop. We want to figure out a way to keep everyone in there.'" Garrett: "That's correct. They could have." Q: "But they didn't do that?" Garrett: "They did not.").

approach would require pre-implementation bargaining to agreement or impasse over the departmental reduction decision *and* means to avoid termination after the reduction, such as internal loans, transfers, etc. Not only would this "two stage" approach substantially *prolong* pre-implementation bargaining, but it would also create uncertainty for employers as to when they have satisfied their decision bargaining obligations.

The GC's position in this case is unworkable, particularly in situations where, as here, a layoff decision – to take headcount down by X number of employees in a given department based on customer orders – is based on exigent economic circumstances that require it be implemented promptly. *See Lapeer*, above at 954 (recognizing "management has a legitimate concern with the need for speed and flexibility in effectuating a layoff to remedy its economic plight"). While bargaining over the effects of that decision on employees may involve a much broader and varied range of issues, this does not conflict with the legal framework for layoff bargaining in exigent circumstances because the effects can then be bargained both before and after implementation upon union request.

3. Alternatively, Even Assuming the Union Did Not Waive Decision Bargaining, the Parties Reached Impasse on "the Decision" Before April 21, 2017.

The GC's allegation of a decision bargaining violation alternatively should fail because the parties had exhausted bargaining over "the decision" by April 19, however defined, and the Union pursued no further bargaining and made no further proposals after the April 19 session and before the April 21 layoff. Impasse in bargaining was reached.

"A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subject in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." *Eads Motor E. Air Devices*, 346 NLRB 1060, 1063 (2006) (quoting *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), enf. denied on other grounds 500 F.2d 181 (5th Cir. 1974)). The Board has defined impasse as "the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile." *A.M.F. Bowling Co.*, 314 NLRB 969, 978 (1994), enfd. denied on other grounds 63 F.3d 1293 (4th Cir. 1995).

After bargaining to impasse, an employer does not violate the Act by implementing "changes" that are reasonably comprehended within its pre-impasse proposals. *Taft Broadcasting*, 163 NLRB 475, 478 (1967), *enfd. sub. nom. Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). The employer's duty to bargain "does not imply a duty to agree to the union's counterproposals or to make a concession," nor does it "give the union a right to veto the proposed changes by withholding consent." *Colorado-Ute Electric Assn.*, 295 NLRB 607, 609 (1989), enf. denied on other grounds 939 F.2d 1392 (10th Cir. 1991). "If the parties have bargained to good-faith impasse and the union has been unable to secure concessions or agreement to its proposals, then the employer may proceed to implement the changes it proposed to the union in negotiations." *Id.*

In determining whether a valid impasse exists, the Board considers a number of factors, including: (1) the bargaining history; (2) the good faith of the parties in negotiations; (3) the length of the negotiations; (4) the importance of the issue or issues as to which there is disagreement; and (5) the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.*, above at 478. The GC's position that no impasse was reached is not supported by application of these factors.

a. The parties' bargaining history supports impasse.

The parties' failure to reach an agreement regarding the May 2015 bond shop layoff – the only prior layoff at the Red Oak facility during the first contract bargaining period – supports a finding they were unable to reach agreement here either. With respect to the May 2015 layoff, Triumph proposed following the status quo layoff policy – the same method it proposed using here. *See* R. Exh. 8 (Triumph's April 16, 2015 letter to the Union); Joint Exh. G. The parties bargained over the May 2015 layoff, but were unable to reach an agreement to deviate from the status quo layoff policy. R. Exh. 9, at 2; Tr. 301:5-14. Thus, it is not surprising that the parties were unable to reach an agreement over the same issues in 2017 despite more extensive bargaining and proposal exchange.

Further, by April 2017, Triumph and the Union had been bargaining over an initial collective bargaining agreement for the Red Oak facility *for over two years*. Their inability to reach an agreement on an overall contract, or even a contract clause dealing with reductions in force, until March 2018, reinforces the lack of a viable prospect for some immediate "deal" before the April 21 layoff.

b. Triumph bargained in good faith over alternatives.

Triumph met with the Union four times to discuss the layoff, and the parties exchanged numerous written proposals and engaged in several hours of related discussions. Triumph also provided *extensive information* requested by the Union.

While both parties insisted on key positions as related to a possible loan, transfer rights, and selection procedures for impacted bonders, insistence on positions is not bad faith. Both parties "have a duty to negotiate with a sincere purpose to find a basis of agreement," but "an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (quotations omitted). Under Section 8(d) of the Act, the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." With bad faith claims based on one party disliking the other's proposal(s), the U.S. Supreme Court has held that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970) (citation omitted).

As a result, the Board refrains from deciding whether "particular proposals are either 'acceptable' or 'unacceptable' to a party." *Reichhold Chemicals, Inc.*, 288 NLRB 69, 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990). The Board looks only to "objective factors"

of a party's desire to "frustrate agreement" through proof of "intransigence or insistence on extreme proposals." *Id.* at 69, 71. Employers have the right to maintain "hard" proposals and decline further concessions. *Coastal Elec. Coop., Inc.*, 311 NLRB 1126, 1127 (1993) ("[T]he Respondent's various positions, although indicative of hard bargaining, are not inherently unlawful, and its failure to make concessions, in the absence of other indicia of bad faith, is not a sufficient manifestation of bargaining with intent to avoid agreement."). Overall, Congress "never intended that the Government would [] step in, become a party to the negotiations and impose its own views of a desirable settlement." *H. K. Porter*, 397 U.S. at 103-04.

Triumph clearly wanted to reach a deal to avoid a potential dispute. It could have insisted from the start on its proposal to apply the status quo policy, without deviation, which would have narrowed the range of options considerably. But instead Triumph considered creative and reasonable alternatives to the status quo that it found *less preferable* in the hopes of reaching a deal and keeping impacted bonders employed after April 21 in other departments. The Union, however, did not like Triumph's proposals, and refused to consent to Triumph's ability to select bonders based on performance and/or business need, or transfer rights that involved a possible lower compensation rate after transfer. Tr. 130:17-20; 198:18-199:13 (Q: "If you have somebody who's been doing the job for five, ten years making $25 an hour and then somebody from bond shop who has no experience comes in making $39 an hour." Barker: "The perception. What you're talking about is a perceived inequity." Q: "Yeah." Barker: "They don't know the experience level these people might've had."). The Union was entitled to withhold its consent, but this does not mean by doing so it could veto the layoff altogether.

What's more, Triumph did make some notable concessions on alternatives to the status quo policy, even though it was not required to do so. For example, Triumph offered to consult with the Union and attempt to mutually resolve any concerns relating to loan assignments. Joint Exh. M; Tr. 86:10-12. Triumph also proposed a modified "rack and stack" procedure that would include seniority as a factor for selection before transfer rights applied. Joint Exh. P. In addition, Triumph explained its reasons for demanding discretion over loan selection and assignments, the "rack and stack" selection procedure for bonders, and experience-based compensation for bonders who transferred to assembly.

Although conduct such as "delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings" may indicate a lack of good faith, *Atlanta Hilton*, above at 1063 (footnotes omitted), none of these indicia is present here.[8]

[8] Nothing in the on-the-record bargaining notes from either party shows Triumph withdrew the April 6 loan proposal. And contrary to the testimony of the GC's witnesses, Tr. 162:15-17, 181:19-20, Triumph did not "rescind" the April 6 loan proposal, but rather merely expressed its lawful adherence to its bargaining position regarding selection and assignment. Tr. 269:16-270:4. Even assuming Triumph rescinded the proposal, focusing on *one proposal* out of the several proposals and counter-proposals on alternatives to the status quo policy does not show overall "bad faith" or otherwise undermine the impasse reached by April 19. Indeed, had the Union wished to return to the concept of loans rather than transfer rights for impacted bonders, it could have done so between April 7 and April 19. *See* Tr. 272:12-16.

c. The length of the negotiations demonstrates impasse.

As noted above, the parties met four times over the course of 24 days. "[T]he amount of time and discussion required to meet a bargaining obligation is dependent on the exigencies of a particular business situation." *RBE Electronics*, 320 NLRB at 82. Bargaining here related to one issue – the April 21 staffing reduction in the bond shop – and both parties were aware of its time-sensitive nature. The topics discussed – alternatives to the status quo reduction in force procedures and means to avoid termination – involved issues that the parties already had bargained over as part of the first contract negotiations, with each side understanding the others' general views. Tr. 198:4-12, 198:16-199:23. Under the circumstances, including both the business conditions and the parties' bargaining experience, the bargained occurred for a sufficient length of time to reach impasse.

d. The parties disagreed on important issues.

The Union clearly disagreed with Triumph's status quo reduction in force policy. Tr. 198:11-12 (Barker: "The company understood we weren't onboard with pure rack and stack."); Joint Exh. Q ("[T]he Union is wholeheartedly opposed to the rack and stack philosophy."). The parties also disagreed on alternative approaches to the status quo, including the loan and transfer selection procedures and the rate of pay for bonders who transferred to the assembly department. These were critical issues for both parties. As noted above, the layoff policy – and in particular, the "rack and stack" selection process and recall rights – was a major issue in the overall contract negotiations, and the Union viewed the April 21 layoff as a possible "benchmark" for the overall contract. Tr. 195:7-12.

e. Both parties understood they had reached impasse.

The evidence demonstrates both parties understood they were at bargaining impasse on April 19, 2017 – two days before Triumph implemented the layoff. To begin, Triumph told the Union on March 28 that it was seeking to implement the layoff by April 21. *The Union never objected, and repeatedly indicated it understood this timeline.* As early as April 14, the Union acknowledged that "the parties might not reach an agreement" before April 21. Joint Exh. Q. On April 19, the Union again acknowledged that bargaining over the layoff had reached an end. R. Exh. 7 (9:17 a.m. session), at 4 ("James [Ducker] - … It doesn't look like that our bargaining is going to determine how this [the layoff] happens."). After Triumph rejected the Union's last-minute proposal on April 19, the Union said it would discuss making another proposal and let the Company know. *Id.* (1:00 p.m. session), at 9-10. After discussing, the Union told the Company: "we don't see resolution coming today. Our next order of business going forward will be dealing with the wage proposals and the disciplines in the morning and whatever contractual items we discuss over the next 2 days." *Id.* (2:26 p.m. session), at 1.

By April 21, the parties had engaged in substantial bargaining over the layoff, and yet could not reach agreement on an alternative from the status quo method or new rights for impacted employees. The Union chose not to request any further bargaining or make any new

proposals after the April 19 session, which supports an impasse finding. *See ACF Industries*, 347 NLRB 1040, 1041 (2006) (finding impasse where "[t]he Respondent had nothing left to offer beyond that which had already been rejected, and the Union similarly had offered no new proposals to demonstrate that further progress was possible."); *Chicago Local 458-3M v. NLRB*, 206 F.3d 22, 34 (D.C. Cir. 2000) (finding impasse where company rejected union's proposals and the union failed to offer any new proposal); *Huck Mfg. Co.*, 254 NLRB 739, 754 (1981) (whether the parties continue to meet and negotiate is relevant to determining the existence of impasse), enfd. in relevant part 693 F.2d 1176 (5th Cir. 1982).

At trial, when Mr. Ducker was asked what, if anything, the Union still wanted to bargain about after April 19, he could not provide any specifics. Tr. 141:14-23. Ducker testified the Union "wanted to continue to negotiate," but admitted that "we didn't have a proposal." Tr. 172:1-6. Barker also admitted the Union had no further proposals to make. Tr. 205:21-206:6. Instead, the evidence clearly shows the Union had nothing left to offer. *See ACF*, 347 NLRB at 1041 (union's request for additional meetings did not preclude impasse where the union failed to offer any specific proposals: "if the Union had meaningful proposals to make, it could have done so and asked for further negotiations on these proposals …. [but] the reason the Union failed to do so was because it had no further (nonregressive) proposals to offer").

To the extent the GC argues that the parties were not at impasse because the Union requested *information* on laid off employees after April 19, the GC still lacks evidence of a *bargaining request* after April 19. *See Bell Atlantic*, 336 NLRB at 1076 (finding union did not sufficiently request bargaining over a decision to transfer unit work by filing grievances and requesting information about the decision); *Windsor Redding Care Center, LLC*, 366 NLRB No. 127, slip op. at 27 (July 17, 2018) (finding union's request for employee's personnel file did not constitute a request to bargain where no other action on the part of the union indicated a desire to bargain). Notably, the GC was unable to establish the date of one of the post-layoff information requests – GC Exh. 12. Tr. 416:11-417:6. Further, while the Union's April 28, 2017 request sought detailed attendance records for those laid off (GC Exh. 13), this information was at most marginally relevant to the layoff "rack and stack" selection procedure, which relied on attendance disciplines. Joint Exhs. A and U; Tr. 256:9-18. Attendance accounted for only 5% of an employee's ranking, and the Union apparently did not request information relevant to the remaining 95% of the rankings. Tr. 431:15-432:8.

While the Union claimed it requested the attendance information to verify the layoff rankings were correct, the Union never requested bargaining over the ranking or proposed an alternative ranking of employees. Tr. 207:5-7, 436:23-437:3. The Union clearly had no intention to bargain over individual rankings or selection under the status quo process. Tr. 437:2-3 (Barker: "I am not here to sit and blame somebody else that should be rated differently."). While Barker testified that the Union found "inconsistencies" in the rankings used to implement the April 21 layoff, he admitted the Union was not seeking bargaining on this topic. Tr. 438:25-439:2 ("That doesn't give us the right to go back and challenge at the end of

the day.").[9] Therefore, the Union's post-April 21 requests for information relating to individual rankings and selection have no bearing on whether the parties were at impasse before April 21.

If the Union believed Triumph failed to bargain to impasse or otherwise was refusing to bargain, it could have filed an unfair labor practice charge. It never did. Instead, in response to employee complaints about the layoff, the Union instructed impacted employees to file unfair labor practice charges as individuals. Three of the 12 laid off employees filed charges in May 2017; however, none of those individuals was part of the Union bargaining committee or had any firsthand knowledge of the negotiations. The individual charges cannot then be construed as requests *by the Union* for further bargaining, especially given that Triumph was not obligated to bargain with the individual charging parties directly (and in fact, would have violated Sec. 8(a)(5)'s prohibition on direct dealing had it done so).[10]

Finally, although the GC may argue that Triumph did not issue a "last, best, and final" proposal before April 21, under the circumstances such a proposal was not needed to reach "impasse." Triumph already had a status quo policy governing reductions in force from 2013, and it was not seeking to change that policy for this April 2017 layoff. Instead, Triumph proposed implementing the layoff pursuant to that policy, the parties reached impasse over *alternatives* to that policy. *See Taft Broadcasting Co.*, 163 NLRB at 478 ("after bargaining to an impasse … an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals"). Triumph simply implemented the status quo policy at impasse, not some alternative that changed the status quo.

4. Even If a Bargaining Violation Is Found, the Remedy Should Be a *Transmarine* "Effects" Remedy.

The GC apparently seeks full reinstatement and backpay for the 12 laid-off bond shop employees, rather than the limited backpay remedy for bargaining violations as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). The remedy sought here is an extreme demand under the facts, even assuming a bargaining violation. A full reinstatement and backpay remedy is designed to, and in practice has been used to, remedy an employer's *total failure* to notify and bargain over a layoff decision in circumstances involving economic exigencies. *See, e.g.*, *Pan American Grain*, 343 NLRB at 318; *Lapeer*, 289 NLRB at 954. The Board has never

[9] It was somewhat odd that the Union pursued these information requests but never requested to bargain over "effects" issues for impacted bonders, such as transfer rights, recall rights, severance, etc. after April 21. The Union witnesses' half-hearted attempt to blame Danielle Garrett for the lack of post-implementation bargaining is not objectively supported by the record or any contemporaneous documentation showing the Union demanded to bargain and Triumph refused to do so. Again, if the Union truly had more to offer or a genuine interest in continuing to bargain, it could have made another proposal. Its failure to do so shows the parties were at impasse.

[10] The Union became a party to one amended charge on January 8, 2018 (Case No. 16-CA-198417, originally filed by Michael Kindley), about three weeks before the first complaint issued in late January, but approximately eight months after the three individuals filed the original charges in May 2017. GC Exh. 1(i).

imposed a full backpay and reinstatement remedy where, as here, the employer gave the union 24 days' advance notice and opportunity to bargain, and did bargain, prior to implementing the layoff.

Triumph worked hard – from the start – to comply with its statutory duty and should not be saddled with the most severe penalty available simply because the Union disagreed with the status quo and various alternatives to the status quo policy. To award a decision bargaining remedy here would be to allow a union to exercise a *de facto* veto power over an employer's economically-necessitated decision to reduce headcount in a department by objecting to the status quo policy and/or possible alternatives involving loans, transfers, recall rights, and selection procedures.

Accordingly, even if the parties were not at impasse regarding the layoff as of April 21 (and, for the reasons discussed above, they were), the appropriate remedy is the more limited *Transmarine* remedy, which is designed to ensure that meaningful bargaining occurs, but does not reverse the employer's headcount decision altogether. *See KGTV* at 1286 (ordering a *Transmarine* remedy instead of full backpay and reinstatement where the employer gave three weeks' advance notice of the layoff but declined to engage in effects bargaining); *Print Fulfillment*, 361 NLRB at 1243 (awarding a *Transmarine* remedy where the union waived its right to bargain over the layoff decision); *see also Tramont Mfg., LLC*, 365 NLRB No. 59, slip op. at 3, 9 (Apr. 7, 2017) (awarding *Transmarine* remedy where employer implemented layoff decision pursuant to employee handbook and gave no notice or opportunity to bargain over effects), remanded in part, 890 F.3d 1114 (D.C. Cir. 2018).

IV. THE DISCIPLINE ALLEGATIONS

A. FACTS RELATING TO THE DISCIPLINE ALLEGATIONS

1. Discipline Notification and Bargaining at the Red Oak Facility Between March 2014 and May 2017.

As noted above, the initial terms and conditions of employment Triumph established in August 2013 for employees at its Red Oak facility included a code of conduct and progressive discipline policy. Joint Stip. 3. The code of conduct provides, in relevant part:

> Major Offenses
>
> The following offenses are subject to the disciplinary action indicated:
>
> * * *
>
> (2) Gross negligence in performing duties.
>
> (3) Failure to report any errors, damage, or poor workmanship to supervision.
>
> * * *
>
> Disciplinary Actions – Major Offenses
>
> Committing any Major Offense can result in the following actions being taken:

(1) First offense: Written final warning notice, written final warning notice and disciplinary suspension, or discharge.

(2) Second offense: Discharge.

Joint Exh. A, at 7, 9.

On March 5, 2014, Triumph provided the Union with copies of disciplinary notices, warnings, and records issued to bargaining unit employees at the Red Oak facility on or after January 13, 2014. Joint Exh. B. Triumph proposed that the parties "establish an agreed-to process whereby designated Union representatives could be notified of and respond to disciplinary actions at Red Oak,"[11] or alternatively, an interim grievance procedure by which the Union could grieve unit member discipline, up to and including termination. *Id.* The Union did not respond to Triumph's offer to bargain over individual disciplinary actions or an interim grievance procedure.

On April 1, 2014, Triumph sent the Union another letter again raising the issue of employee discipline at Red Oak. Joint Exh. C. The letter attached disciplinary actions issued against bargaining unit employees at the facility since Triumph's March 5, 2014 correspondence. The letter also noted that the Union had failed to "respond or in any way acknowledge the Company's desire to establish a mechanism by which your represented members may have representation in disciplinary actions" or to "notify the Company of a Union representative that the Company should contact in the event of potential disciplinary action." *Id.* Triumph reiterated its offer to "discuss issued discipline and to bargain over an interim notification and/or grievance procedure for discipline," and stated that "in the meantime the Company will continue to enforce the established terms and conditions of employment, including taking disciplinary action for violation of Company rules and procedures." *Id.* The Union again did not respond. Tr. 310:22-24.

Triumph needed the Union to designate a representative to receive notice of potential disciplinary action because there were no Union stewards, committee members, or other Union representatives on-site at Red Oak. Tr. 315:5-18. In the face of the Union's silence on this issue, and its evident lack of interest in pursuing the opportunity to bargain over employee discipline or an interim grievance procedure, Triumph continued a regular practice of sending periodic (approximately monthly) letters to the Union attaching all discipline issued to the Red Oak facility bargaining unit employees over the preceding period. Each letter repeated the same offer to bargain over discipline, whether before or after it issued. *See* R. Exhs. 2 (letters dated April 7, 2016; September 6, 2016; October 4, 2016; November 3, 2016; December 6, 2016; February 6, 2017; March 7, 2017; April 3, 2017; May 4, 2017) and 10 (letters dated September 9, 2014; October 1, 2014; November 12, 2014; August 4, 2015; September 8, 2015; October 8, 2015;

[11] Triumph made this offer in compliance with then-extant Board law as stated in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), which was vacated by the U.S. Supreme Court's June 2014 decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

November 4, 2015; December 7, 2015; January 5, 2016; March 14, 2016)[12]; Tr. 311:2-7, 312:17-314:3.

After receiving approximately 30 such regular update letters from Triumph, the Union nebulously complained about discipline at the facility in a November 14, 2016 letter. Joint Stip. 10. The letter stated "[i]t has recently come to the Union's attention that you have failed to notify and bargain" over discipline issued to bargaining unit members at the Red Oak facility, and "demand[ed] that all those affected be made whole" and that "those employees in which the Company seeks to discipline be brought to the negotiating table for further discussion prior to imposing any further action." Joint Exh. D.

Danielle Garrett testified that she was confused about what the letter meant, particularly because the Union had been receiving notice and opportunity to bargain over discipline on a regular basis since March 2014. Tr. 316:20-24. Garrett did not understand the Union to be seeking pre-discipline notice or bargaining, but rather understood the Union's demand that "all those affected be made whole" to refer to previously-issued discipline only, and the Union's reference to the "negotiating table" to refer to the parties' first contract negotiations. Tr. 317:4-7, 317:13-15.

Triumph responded on December 12, 2016, reminding the Union that Triumph had previously provided the Union with employee discipline updates, and that the Union had never responded to Triumph's request to designate an available representative who could be notified of and respond to disciplinary action at Red Oak. Joint Exh. E. Triumph again asked the Union for a "designated representative who can receive text or other immediate messages prior to the issuance of suspension or termination decisions, and who can be readily available more than just the periodic contract bargaining sessions." *Id.*

The Union's subsequent conduct reinforced Triumph's understanding that the Union was not seeking pre-discipline bargaining. The Union failed to provide Triumph with a contact point(s) for engaging in timely pre-discipline bargaining. Tr. 318:4-319:5.[13] Instead, the Union

[12] Danielle Garrett testified that she had not retained copies of every letter that was sent, but that each letter listed the previous dates on which a letter had been sent. Tr. 313:10-16. Thus, in addition to the dates listed above, letters were also sent on April 1, 2014; April 9, 2014; August 4, 2014; December 16, 2014; January 6, 2015; February 17, 2015; April 13, 2015; May 5, 2015; June 10, 2015; July 9, 2015; February 3, 2016; May 5, 2016; June 9, 2016; July 11, 2016; August 1, 2016; and January 13, 2017. See R. Exh. 2 (May 4, 2017 letter).

[13] Barker's testimony on an alleged verbal request to the contrary should not be credited. *See* Tr. 218:9-219:15. First, Barker admitted that the Union never provided this information in writing, which was contrary to the parties' typical practice for such communications. Tr. 219:3-4, 221:3-4. Second, his testimony was vague and evasive. When asked if the Union responded to the statement in Triumph's December 12 letter that the Union had not provided a designated representative to contact, Barker responded "We talked all the time. Yes, I believe the company absolutely knew that they could get a hold of Mr. Ducker. I believe we told them that…. I feel that we told them who to call." Tr. 218:11-25. But when asked whether the Union indeed responded verbally, Barker avoided answering directly: "Mr. Ducker was ready. Mr. Ducker was the president at the time, he was here, he could've done that very easily." Tr. 219:12-15. Finally, Barker's testimony was contradicted by Ducker, who admitted the Union

on December 21, 2016 proposed a procedure whereby disciplinary actions would be bargained *after* their implementation, at periodic first contract negotiation sessions. Joint Exh. F. Triumph agreed, and that process continued for approximately five months, until May 2017, without objection from the Union. Tr. 320:9-321:6.

2. Thomas Smith's Termination.

On November 29, 2016, Triumph terminated employee Thomas Smith for poor workmanship and gross negligence in performance of his job duties, after a history of similar violations and progressive discipline. R. Exh. 11. The termination notice, while sent to Smith, was inadvertently omitted from Triumph's regular monthly update to the Union in December 2016. R. Exh. 12, at 2; Tr. 327:2-14. On February 6, 2017, Triumph notified the Union of Smith's termination and said it would provide the relevant documentation the next day, February 7, when the parties had agreed to bargain over employee discipline as proposed in the Union's December 21, 2016 letter. R. Exh. 12, at 2; Tr. 327:14. The parties agreed that they would discuss Smith's June 24, 2016 suspension on February 7, as planned, and postpone discussion of his termination to a later date. *Id.* at 2-3.

At the February 7 bargaining session, Triumph provided documentation to the Union concerning Smith's termination. Joint Stip. 17; Tr. 327:11-14. Subsequently, the parties discussed Smith's discipline and Triumph's rationale and basis for its decision. Tr. 327:20-328:8; 220:11-14. The Union disagreed with Triumph's choice of penalty, but the parties were unable to reach a resolution, and the Union did not seek further bargaining. Tr. 328:9-12.

The Union did not file a charge over Smith's termination or any alleged failure to bargain either before or after the termination decision. However, Smith filed a charge on an individual basis on May 8, 2017. GC Exh. 1(e).

3. Rodney Horn's Suspension.

On April 3, 2017, Triumph issued employee Rodney Horn a five-day suspension for gross negligence and failure to report errors to management. R. Exh. 13. On May 4, 2017, Triumph informed the Union of Horn's suspension, in keeping with Triumph's longstanding practice, which the Union had accepted, of providing monthly discipline updates for Red Oak bargaining unit employees since early 2014. Joint Stip. 34; Joint Exh. V; R. Exh. 14.

The Union requested additional information about the suspension, which Triumph provided on or around May 23, 2017. Tr. 413:17-18. Triumph and the Union discussed Horn's suspension, including Triumph's reasons for suspending him and the Union's proposal that his suspension be reduced. However, the parties did not reach an agreement, and the Union did not seek further bargaining. Tr. 330:20-331:4.

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was not interested in pre-discipline notice until May 2017 and did not respond to Triumph's requests to provide a contact point. Tr. 156:24-157:18.

The Union did not file a charge over Horn's suspension or any alleged failure to engage in pre-discipline or post-discipline bargaining. Instead, on May 2, 2017, Horn filed a charge as an individual. GC Exh. 1(c).

4. Triumph and the Union Negotiate and Agree on an Interim Discipline Notification Process.

As discussed above, from March 2014 to May 2017 the Union did not respond to Triumph's requests for a designated representative to receive notice prior to the imposition of discipline, request pre-discipline notification or bargaining, or otherwise indicate that it objected to Triumph's practice of providing monthly update letters. Ducker testified that the Union was not interested in receiving pre-discipline notice because he believed there "was no point." Tr. 157:12-18.

Shortly after Smith and Horn filed their unfair labor practice charges, however, on May 26, 2017, the Union sent Triumph a letter requesting to meet and bargain over "an interim notification process for discipline for Red Oak bargaining unit employees." Joint Exh. W. This was the first time the Union had requested pre-discipline bargaining at the Red Oak facility. Tr. 321:21-25, 154:20-24. Triumph quickly responded and agreed to meet on June 1 and June 2, 2017.

After discussions on June 1 and 2, the parties executed an "Interim Discipline Notification for Red Oak Agreement" on June 2, 2017. Joint Stip. 36; Joint Exh. X; Tr. 322:4-12. Among other things, the agreement provided that Triumph would notify the Local 848 President, International Representative, and the local union hall Executive Assistant by email "[s]hould the Company determine a suspension, demotion, or termination is potentially warranted." Joint Exh. X, para. 2. The agreement further provided that the "Union President shall have two (2) business days to notify [Triumph] that the Union desires to bargain the tentative discipline prior to its implementation," and the parties "shall meet within two (2) business days of the Union's response to discuss the discipline." *Id.* In addition, the agreement granted the Union president access to the Red Oak facility to investigate discipline. *Id.*, para. 6.

B. ARGUMENT

The GC alleges that Triumph violated Section 8(a)(5) of the Act by terminating Smith and suspending Horn "without first providing the Union with notice and an opportunity to bargain." Complaint, GC Exh. 1(s), paras. 12, 15, and 17. The GC does not allege, and there is no evidence, that the termination or the suspension constituted a change in Triumph's policies or procedures. Nor is there any evidence or allegation that Triumph failed to satisfy any *post-implementation* notice or bargaining obligations.

Although Triumph did not contact the Union prior to terminating Smith or suspending Horn, Triumph's actions were consistent with its longstanding practice involving hundreds of other disciplines, which the Union acquiesced to, of providing post-implementation notice sent to the Union through periodic (on average monthly) letters. Extant Board law on pre-decision bargaining does not mandate that such bargaining in fact always occur – only that an employer

be willing to engage in such bargaining if the union requests such. *Total Security Management ("TSM")*, 364 NLRB No. 106 (Aug. 26, 2016).

The evidence in this case demonstrates that Triumph was not only willing to engage in pre-decision bargaining, it repeatedly offered the Union the opportunity do so some 30-plus times over an almost three year span prior to the charges in this case. The Union, however, by its own admission, *was not interested*. Under these circumstances, the principles of equitable estoppel preclude holding Triumph liable for conduct that the Union for years led Triumph to believe it did not object to. Accordingly, these allegations should be dismissed for the reasons expanded upon below.

1. Equitable Estoppel Principles Preclude an Argument That the Union Was Entitled to Pre-Discipline Notice Under *Total Security Management*.

With respect to Section 8(a)(5) bargaining rights, the Board "has long recognized that principles of equitable estoppel will preclude a party from complaining of a unilateral change in a term or condition of employment where it has, by its conduct, led the other party to reasonably believe that it could deal unilaterally with the subject." *Manitowoc Ice, Inc.*, 344 NLRB 1222, 1222-24 (2005) (dismissing allegation involving employer's unilateral change to its profit-sharing plan because the union had acquiesced to the employer's previous unilateral changes to its profit-sharing plans by failing to complain to the employer or file charges with the Board). Estoppel may "'result even though the party estopped … did not intend to lose or forego its existing rights or did not consciously agree' that the other party was free to make unilateral changes." *Id.* (quoting *Tucker Steel Corp.*, 134 NLRB 323, 333 (1961)).

A party may be precluded from asserting its right to bargain over an issue based on "the conduct of the parties (including past practices, bargaining history, and action or inaction)." *American Diamond Tool*, 306 NLRB 570, 570-71 (1992) (quotation omitted) (dismissing unilateral layoff allegation where the union did not object to or request bargaining over an earlier unilateral layoff or unilateral layoffs in general, and there was no evidence the employer would not have bargained about the layoffs). "Particularly in the context of initial collective bargaining, where parties have no contract, past practice, or established relationships to guide them," the Board has stated that it is "incumbent on the Union to take more affirmative action in order to preserve its right to protest" an employer's unilateral actions. *Id.* at 571.

For several years, the Union led Triumph to reasonably believe it could discipline unit employees without first notifying the Union. The Union never requested pre-discipline notice and bargaining, despite ample opportunity to do so. In fact, Triumph repeatedly asked the Union for a designated representative to contact prior to imposing discipline and offered to negotiate an interim notification procedure. Each letter between March 2014 and May 2017 stated "you have failed to notify the Company of a Union representative that the Company should contact in the event of potential disciplinary action." Joint Exh. C; R. Exhs. 2 and 10.

The Union did not respond to Triumph's requests until May 2017 because, as Ducker admitted, the Union was not interested in pre-discipline notice or bargaining. Specifically, Ducker testified as follows:

> Q In connection with the charges that bring us here today, Mr. Ducker, which involve the bond shop layoff as well as Mr. Smith's discharge and Mr. Horn's suspension, do you recall giving an affidavit to Region 16?
>
> A Yes.
>
> Q In that affidavit, do you recall discussing the discipline letters that are Respondent Exhibit 2?
>
> A Yes.
>
> Q Do you recall saying, "Within the discipline letters, the employer asked about establishing an agreed upon process where union representatives can be notified about discipline and regarding bargaining an interim grievance procedure. I had not responded to these requests until last week." Do you recall making that statement?
>
> A Yes.
>
> Q That affidavit was given on or about May 31st, 2017?
>
> A Okay.
>
> Q Does that sound right?
>
> A Yes.
>
> Q You also - - let us know if you recall making this statement, "I had not responded to the employer's request about a procedure for informing the union before employees are disciplined or an interim grievance procedure before last week because I believe that without enforceability, there really was no point." Do you recall making that statement?
>
> A Yeah, that was part of the - - our position.

Tr. 156:15-157:18.[14]

[14] While Ducker testified he believed there "was no point," this did not relieve the Union of its duty to request bargaining. *See KGTV*, 355 NLRB at 1284 ("a union's subjective impression of its bargaining partner's intention is insufficient"). The Union witnesses also suggested the reason for the Union's delay in requesting pre-discipline bargaining was the Board's decision in *TSM* issuing on August 26, 2016. However, this testimony completely ignores the fact that Triumph repeatedly offered to engage in such bargaining for several years prior to *TSM*. Further, even after *TSM* issued, the Union still did not request pre-discipline bargaining until May 26, 2017 – some nine months later.

Nor did the Union object to Triumph's practice of providing routine after-the-fact notice through periodic update letters. By November 2016 (when Smith was terminated), the Union had received approximately 30 letters from Triumph informing it of all disciplines (warnings, suspensions, and terminations) issued to unit employees, and by April 2017 (when Horn was suspended), it had received approximately 35 such letters. *See* Joint Exh. V; R. Exh. 2 (November 3, 2016 letter). Yet the Union never pursued pre-discipline notice or bargaining, nor did it file any unfair labor practice charges alleging the lack of pre-discipline notice or bargaining. *See Washoe Medical Center*, 337 NLRB 202, 202 n. 1, 206 (2001) (dismissing failure-to-bargain allegation where, although the employer never notified the union before it imposed discipline or offered to bargain about any discipline, the union became aware of discipline issued to various employees after the fact but "never requested bargaining over any of the employee discipline and only sought to assist certain employees in protesting their discipline through utilization of the internal company appeal process").

To the extent the GC argues that the Union's November 14, 2016 letter (Joint Ex. D) should be interpreted as a request for pre-discipline bargaining, this claim should be rejected. At most, the letter merely protested previously-issued disciplinary actions and requested *post-imposition bargaining* (which, as discussed below, the parties engaged in). But the letter did not request pre-discipline bargaining. A union's mere protest of or objection to a unilateral change is not an adequate substitute for requesting bargaining. *See Associated Milk Producers*, 300 NLRB 561, 564 (1990) ("[I]t was incumbent on the Union to request bargaining – not merely to protest or file an unfair labor practice charge."); *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977) (unilateral changes found lawful where union officials "contacted Respondent and protested its contemplated actions," but "at no time did employee representatives request Respondent to bargain about [the proposed changes]"), enfd. 586 F.2d 835 (3d Cir. 1978).

Further, a request for pre-discipline bargaining must be specific. In *Windsor Redding Care Center, LLC*, the Board affirmed the judge's dismissal of an allegation that the employer unlawfully failed to engage in pre-discipline bargaining because, although the union made three general requests to bargain over discipline, the requests at issue:

> Fail[ed] the before-the-fact specificity that is required under Board law. Rather, the bargaining notes assert vanilla, bland, cryptic, general propositions that amount to nothing more than the Union's request to have a participatory voice generally in the employee *disciplinary* process and not specific requests to engage in before-the-fact bargaining with respect to the specific discipline, namely suspension and termination, of specific employees. … The Union's requests to engage in pre-discipline bargaining were too nebulous, too ambiguous, and too general to serve as a predicate and trigger a responsibility on the part of the Respondent to bargain with the Union before suspending and terminating [the employees at issue].

366 NLRB No. 127, slip op. at 1 n. 3, 26-27 (July 7, 2018).

Here, the Union's reference to the "negotiating table" cannot reasonably be viewed as a request to meet every time Triumph was considering disciplining an employee, particularly given

that the Union failed to provide contact information for a representative to receive timely pre-discipline notice. Thus, the Union did not adequately request pre-discipline bargaining until the May 26, 2017 letter. Joint Exh. W.

The Union's subsequent conduct after November 2016 confirms that it was not seeking pre-discipline bargaining. While Triumph's December 12, 2016 letter (Joint Ex. E) again requested a contact to receive pre-discipline notice, the Union's December 21 response (Joint Exh. F) again failed to provide that information and instead sought to bargain over *previously-issued* disciplines at the parties' initial contract bargaining sessions. Triumph agreed to the Union's request, and the parties thereafter regularly met and bargained over disciplines that had previously been issued. During this time, the Union did not object to this process or give any other indication it wanted pre-disciplining bargaining.

There also is no evidence Triumph would not have engaged in pre-discipline bargaining upon request. Triumph's ongoing attempts since March 2014 to obtain the name of a representative to contact, offers to bargain over an interim procedure, and willingness to engage in post-discipline bargaining as soon as the Union requested it demonstrate the very opposite. And, once the Union finally sought to bargain an interim notification procedure in late May 2017, Triumph immediately accepted the Union's request to bargain, and the parties reached a framework within six days. Joint Exhs. W and X.

In sum, prior to May 2017, the Union acquiesced in Triumph's practice of providing routine notification through periodic update letters and should now be estopped from asserting Triumph's failure to provide pre-discipline notice for Smith and Horn was unlawful. The Union chose not to pursue pre-discipline bargaining. Triumph cannot be held liable for that choice.

Further, while the Union did request post-discipline bargaining as of December 2016, the parties engaged in bargaining but did not agree on any adjustments to either Smith's termination or Horn's suspension. Finding a bargaining violation here – with its possible attendant remedies of backpay, rescission, reinstatement (for Smith), and an order to bargain – would improperly invert the Board's role. The Board cannot function as a neutral guardian of the bargaining process where it would order bargaining that was never requested and award remedies that a party failed to obtain through the bargaining it did request. *Manitowoc Ice*, 344 NLRB at 1223 (The Board cannot, "under the guise of remedying unfair labor practices, … attempt to bestow upon the respondent's union employees the benefits which it believes the Union should have obtained but failed to obtain for them as a result of collective bargaining with the respondent on their behalf.") (quoting *NLRB v. Nash-Finch Co.*, 211 F.2d 622 (8th Cir. 1954)). Accordingly, these discipline allegations should be dismissed.[15]

[15] If a violation is found, Triumph reserves the right to present evidence in compliance in support of its affirmative defenses to backpay and/or reinstatement – including evidence showing Smith's termination and Horn's suspension were "for cause" within the meaning of Sec. 10(c) and relevant evidence showing Triumph satisfied its post-discipline bargaining obligations. The GC did not consolidate the compliance specification with the complaint here, and no party disagreed with Triumph's counsel that these issues were reserved for compliance as needed. *See* Tr. 323:19-25, 329:16-20.

2. Alternatively, *Total Security Management* Should Be Reversed and Triumph's Actions Found Lawful Under the Prior Standard.

Should *TSM* support a bargaining violation, the case should be reversed. In *TSM*, the Board imposed new requirements and restrictions on an employer's ability to discipline represented employees. 364 NLRB No. 106 (Aug. 26, 2016).[16] Former Member Miscimarra dissented, explaining the majority's decision was inconsistent with fundamental labor law principles and decades of NLRA case law. *Id.*, slip op. at 17-41. Triumph asserts that *TSM* should be reversed for the reasons set forth in former Member Miscimarra's dissent. The Board should return to its pre-*TSM* standard, under which an employer was not obligated to bargain with the union before discretionary discipline, so long as the discipline issued did not constitute a change in the employer's preexisting employment rules and disciplinary system. *See Fresno Bee*, 337 NLRB 1161, 1186-87 (2002).[17]

Here, it is undisputed that Triumph's discipline policies were lawfully implemented in 2013, Joint Ex. A, and there is no evidence or allegation that Triumph altered its status quo policies or procedures in terminating Smith or suspending Horn. Rather, Smith's termination was consistent with Triumph's policy regarding disciplinary actions for "Major Offenses" and involved progressive discipline. Prior to his November 2016 termination, Smith had received a number of disciplines, including a June 24, 2016 final written warning and suspension for gross negligence (a major offense). R. Exh. 11. Thus, his subsequent November 2016 termination for gross negligence was consistent with the code of conduct, which provides that the penalty for a second major offense is discharge. Joint Exh. A, at 9.

Horn's April 2017 5-day suspension also was consistent with Triumph's code of conduct. Horn was suspended for two major offenses – gross negligence and failure to report errors to supervision. R. Exh. 13. The code of conduct provides that an employee's first major offense may result in a written final warning and disciplinary suspension. Joint Exh. A, at 9.

Although Triumph's disciplinary policies reserved to Triumph a degree of discretion, Triumph's decisions to terminate Smith and to suspend Horn were well within that discretion. Therefore, Triumph did not alter its status quo disciplinary procedures, and it was not required to give the Union notice and an opportunity to bargain before implementing its discipline decisions. *See Fresno Bee*, above. Accordingly, these allegations should be dismissed under the Board's pre-*TSM* discipline bargaining standard.

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[16] As noted above, the Board imposed similar obligations in its 2012 decision in *Alan Ritchey*, but that decision was subsequently vacated by the U.S. Supreme Court in June 2014. *See supra* fn. 11.

[17] *TSM* is also inconsistent with the Board's more recent decision in *Raytheon Network Centric Systems*, 365 NLRB No. 61 (2017), in which the Board held that a change does not occur, and bargaining is not required, if an employer's actions are similar in kind and degree to its past actions, even if they involve some degree of discretion.

V. CONCLUSION

This case does not involve an employer that ignored or avoided its Section 8(a)(5) obligation to bargain with a labor union. Instead, the evidence shows Triumph made substantial, good faith efforts to comply, and did comply, with all of its bargaining obligations during a lengthy first contract bargaining period.

When faced with economic exigencies affecting its bond shop department, Triumph provided the Union with timely (24 days) notice and opportunity to bargain over the April 21, 2017 layoff. Although the parties did not reach an agreement to deviate from the status quo reduction in force policy – Triumph's proposed method for implementing the reduction – they engaged in meaningful bargaining over the reduction, including alternatives to the policy on issues like loan rights, transfer rights, and selection procedures. Bargaining in this context, as the Board has held, need not be protracted. To find a bargaining violation under this fact pattern would be unprecedented. Accordingly, this allegation should be dismissed.

Triumph also satisfied its bargaining obligations regarding Smith's termination and Horn's suspension. By acquiescing for years in Triumph's practice of providing post-discipline notification, the Union is now estopped from asserting the lack of pre-discipline notice was unlawful. Alternatively, if a bargaining violation is found under the Board's decision in *TSM*, that case should be reversed and the prior standard reinstituted. Under the prior standard, Triumph did not violate Section 8(a)(5) because it made no changes to the status quo discipline procedures in effect.

For all of the foregoing reasons, Triumph submits that the Complaint should be dismissed in its entirety.

Dated: June 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June 2019, a true and correct copy of Respondent Triumph Aerostructures' Post-Hearing Brief in Case Nos. 16-CA-197912; 16-CA-198055; 16-CA-198410; and 16-CA-198417 was filed with the Division of Judges using the NLRB's e-Filing system, and was served via e-mail on the following:

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